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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TAYLOR SMART and MICHAEL
HACKER, individually and on
behalf of all those similarly
situated,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION

Defendant.

Case No. 2:22-cv-02125-WBS-CSK

**DEFENDANT NCAA'S NOTICE OF
MOTION AND MOTION TO EXCLUDE
EXPERT TESTIMONY OF DR. ORLEY
ASHENFELTER AND DR. DANIEL
RASCHER ON CLASS CERTIFICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Judge: Hon. William B. Shubb
Courtroom: 5
Date: March 3, 2025
Time: 1:30 p.m.

SHANNON RAY, KHALA TAYLOR,
PETER ROBINSON, KATHERINE
SEBBANE, and RUDY BARAJAS,
individually and on behalf of
all those similarly situated,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, an unincorporated
association,

Defendants.

Case No. 1:23-cv-00425-WBS-CSK

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, on March 3, 2025, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of this Court, located at 501 I Street, Sacramento, California, Defendant National Collegiate Athletic Association ("NCAA") will, and hereby does, move this Court pursuant to Federal Rule of Civil Procedure 702 for an order excluding the testimony of Dr. Orley Ashenfelter and Dr. Daniel Rascher in connection with Plaintiffs' Motions for Class Certification in the above-captioned actions.

This Motion is based upon the following Memorandum of Points and Authorities, the Declaration of Megan McCreddie, all other materials supporting this Motion, all pleadings on file, including Defendant's concurrently filed Opposition to Plaintiffs' Motions for Class Certification and supporting documents, and any other matter submitted before or at the hearing on the Motion.

DATED: December 20, 2024 MUNGER, TOLLES & OLSON LLP

By: /s/ Justin P. Raphael
JUSTIN P. RAPHAEL

Attorneys for Defendant National Collegiate Athletic Association

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In support of their motions for class certification, the Plaintiffs in both the *Colon* case and the *Smart* case have proffered expert models for predicting what volunteer coaches would have earned. These models violate basic economic principles. In order to estimate earnings, an economist should account for the fact that workers with more experience, tenure and skill earn more. But Plaintiffs' experts did not do that. An economist should not assume that different jobs are subject to the same supply and demand conditions. But that is not what the *Colon* Plaintiffs' expert did. All of this contradicted economic principles that Plaintiffs' experts agreed are standard in the field. Accordingly, the testimony of Dr. Orley Ashenfelter in the *Colon* case and Dr. Daniel Rascher in the *Smart* case regarding earnings models is unreliable, inadmissible and should be excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

First, both experts admittedly failed to control for the textbook economic principle that skill and experience affect earnings. As Dr. Ashenfelter himself has explained in earlier work, "[s]tandard human capital theory links an individual's earnings to his or her level of education, job experience, industry and industry experience, and an individual's job title in a particular industry." Declaration of Megan McCreadie ("McCreadie Decl.") Ex. 1 ¶ 96. Both experts agreed that this human capital theory is fundamental to labor economics. In his prior work, including in antitrust cases, Dr. Ashenfelter

1 controlled for "employee-specific variables" in estimating
2 earnings. *Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D.
3 270, 305 (N.D. Cal. 2016). So did the expert in *Law v. NCAA*,
4 which is Plaintiffs' template for this case. See Aff. of Robert
5 D. Tollison, *Law v. NCAA*, 1996 WL 34400119 (D. Kan. 1996)
6 ("Tollison Law Aff."). But here, Dr. Ashenfelter and Dr. Rascher
7 did not even try to account for skills and experience that affect
8 earnings but vary from coach to coach. Thus, their earnings
9 models are unreliable and inadmissible.

10 *Second*, both experts failed to address sample selection bias,
11 which they agreed is a well-recognized problem in economic
12 analysis of data. The basic concept is that "when an expert
13 attempts to draw conclusions about an entire population from a
14 sample-based analysis, the sample[] must be chosen using some
15 method that assures the sample[] [is] appropriately
16 representative of the larger entity or population being measured."
17 *In re: Pella Corp. Architect & Designer Series Windows Mktg.*,
18 *Sales Pracs. & Prods. Liab. Litig.*, 214 F. Supp. 3d 478, 493
19 (D.S.C. 2016) (quotations and citation omitted). Otherwise, "a
20 study of that sample will tend to produce inaccurate results."
21 *Id.* at 492.

22 Here, both experts estimated earnings for the entire
23 population of volunteers using a sample of salaries for coaches
24 who were hired for positions created after the bylaws were
25 amended. Those coaches were not representative of all volunteer
26 coaches for reasons related to both supply and demand. On the
27 supply side, the fact that the coaches in the sample were hired
28 for paid positions suggests that they were more experienced and

1 skilled than the volunteers, who were not hired for paid
2 positions. Because more experienced and skilled coaches generally
3 earn more, using salaries of coaches who were hired for paid
4 positions would tend to overestimate what volunteer coaches would
5 have earned. On the demand side, schools that hired paid coaches
6 after the bylaws were amended likely had higher demand for
7 coaching than schools who did not, which means that they would
8 have been willing to pay more. Neither expert addressed either of
9 these potential problems with their sample. That departure from
10 standard economic practice makes both experts' earnings models
11 unreliable.

12 *Third*, Dr. Ashenfelter's earnings model in the *Colon* case
13 improperly assumes that the same supply and demand conditions
14 apply to jobs coaching different sports. Dr. Ashenfelter conceded
15 that "the market rate is determined by supply and demand,"
16 McCreadie Decl. Ex. 2, Ashenfelter Dep., at 183:16-18, and that to
17 calculate a market wage, "you need to use jobs whose salaries are
18 determined by the same factors." *Id.* at 186:12-15. But Dr.
19 Ashenfelter used jobs coaching many different sports without
20 analyzing whether salaries for those jobs are the function of the
21 same supply and demand conditions. Dr. Ashenfelter did not
22 analyze whether jobs coaching indoor volleyball, field hockey,
23 gymnastics, ice hockey, lacrosse, rugby, soccer, softball, track
24 and field, water polo and wrestling are in the same market, but
25 his model grouped together salaries in those sports. Dr.
26 Ashenfelter admitted that this approach "could mask variation
27 between" sports. *Id.* at 50:11-14. It is not reliable to model
28

1 market wages using salaries that are generated by different supply
2 and demand conditions.

3 This is not a "battle of the experts" about the minutiae of
4 statistical models. Plaintiffs' experts agreed that the economic
5 principles that form the basis for this motion are standard in the
6 field. Plaintiffs' failure to apply those principles cannot be
7 excused because they use terms like "t-statistics." "[R]egression
8 analysis is not a magic formula." *Piggly Wiggly Clarksville, Inc.*
9 *v. Interstate Brands Corp.*, 100 F. App'x 296, 299 (5th Cir. 2004).
10 Plaintiffs' experts' earnings models do not even try to address
11 differences that standard economic principles say matter.
12 Accordingly, the models are unreliable and inadmissible under
13 *Daubert*.

14 **II. RELEVANT BACKGROUND**

15 **A. The Coaching Landscape and Data Available To Experts**

16 The NCAA has bylaws governing collegiate sports in
17 Division I, the Division at issue in this lawsuit. The bylaws are
18 adopted by the membership of the NCAA, comprised of colleges and
19 universities across the country of varying sizes and with varying
20 priorities for their sports programs. McCreadie Decl. Ex. 5,
21 Fraser Dep., at 51:13-54:9. The coaching bylaws set forth the
22 maximum number of coaches that a Division I member school can pay
23 in each sport that the school sponsors. *Id.* at 128:17-129:14.
24 Each member school chooses how many sports to sponsor and, in each
25 sport, how many coaches to hire and whether or not to pay them.
26 Each school may structure their coaching staff differently. Most
27 schools will have a head coach and then several assistant coaches
28 for each sport.

1 Some schools choose to hire and pay assistant coaches up to
2 the maximum number allowed in each sport, and others do not.
3 There is variation across schools and across sports. See
4 Defendant's Opposition to Plaintiffs' Motions for Class
5 Certification ("Opp") at 23-26, 35-36, 93. Some schools choose to
6 pay some of their assistant coaches significantly more than other
7 assistant coaches in the same sport. See *id.* at 93. Some schools
8 choose to pay assistant coaches in one sport more than assistant
9 coaches in other sports. See *id.* And some choose not to pay some
10 of their assistant coaches at all even though the bylaws would
11 permit doing so. See *id.* at 23-26, 35-36.

12 Until 2023, in most sports, NCAA bylaws allowed member
13 schools to hire an *additional* volunteer coach in addition to the
14 maximum number of paid coaches in that sport. As the name
15 implies, the bylaws prohibited the school from paying the
16 volunteer coach. See McCreadie Decl. Ex. 5, Fraser Dep., at
17 129:22-132:12. Thus, for example, before July 1, 2023, baseball
18 programs could hire up to three paid coaches as well as a
19 volunteer coach for a total of four coaches.

20 In early 2023, the NCAA membership amended the bylaws,
21 eliminated the formal position of volunteer coach and, in most
22 sports where volunteers had been permitted, increased the number
23 of paid coaches that each team could hire if they chose. Under
24 the amended bylaws, programs are not required to pay any of their
25 coaches and can choose not to pay one or more coaches on each
26 team. Thus, for example, under the amended bylaws, baseball
27 programs can now hire up to four paid coaches, but they are not
28

1 required to do so. Baseball programs, as well as programs in
 2 other sports, may choose not to pay one or more of their coaches.

3 **B. Dr. Ashenfelter's Model**

4 The putative *Colon* class consists of coaches in 44 different
 5 NCAA sports, such as softball, rowing, gymnastics, golf, lacrosse,
 6 ice hockey and many more. Their expert is Dr. Ashenfelter. His
 7 model is based on a sample of salaries earned by coaches at 85 of
 8 the more than 300 Division I schools. Report of Orley Ashenfelter
 9 in Support of *Colon* Plaintiffs' Motion for Class Certification, as
 10 Corrected November 26, 2024 ("Ashenfelter Report") ¶ 61.¹ Those
 11 85 schools added at least one paid position in 2023 in at least
 12 one sport other than baseball beyond the maximum number of paid
 13 coaches permitted in that sport during the proposed Class period.
 14 *Id.*

15 For each sport in which these schools hired an additional
 16 paid coach, Dr. Ashenfelter "rank[ed]" the paid coaches from
 17 highest to lowest salary. *Id.* ¶ 67. Dr. Ashenfelter then
 18 "categorize[d]" each program depending on how many unpaid coaches
 19 the amended NCAA bylaws permit each program to hire as of July 1,
 20 2023. *Id.* ¶ 66. The categories are as follows:

27 ¹ The Ashenfelter Report was lodged with the Court on December 13,
 28 2024, along with *Colon* Plaintiffs' Notice of Request to Seal
 Documents and Amend Filings.

Paid Coaches Permitted	Sports
3	women's bowling, women's beach volleyball, men's or women's cross country, men's or women's fencing, men's or women's golf, rifle, men's or women's skiing, men's or women's swimming, men's or women's tennis, women's triathlon
4	women's field hockey; men's or women's gymnastics; men's or women's ice hockey; men's or women's lacrosse; women's rugby; men's or women's soccer; women's softball; men's or women's track and field; men's or women's volleyball; men's or women's water polo; men's or women's wrestling
5	women's acrobatics and tumbling; combined cross country; women's equestrian; men's or women's swimming and diving
6	combined fencing; combined golf; combined skiing; combined swimming; combined tennis; men's or women's track and field/cross country
8	combined swimming & diving; combined track and field; combined water polo
9	women's rowing
12	combined track and field/cross country
13	Football Championship Subdivision ("FCS") football ²

Id. Pooling together the salaries for all coaches and all sports in each category, Dr. Ashenfelter calculates the average ratio between the salary of the second-lowest paid coach and the salary of the lowest paid coach to estimate the percentage "stepdown" from the second-lowest salary to the lowest salary. *Id.* ¶¶ 67-68 & Table 5.

To illustrate, take sports in which the NCAA bylaws now permit four paid coaches, such as men's lacrosse and women's softball. *Id.* ¶ 66. Dr. Ashenfelter found that across those

² Division I football is divided into two subdivisions: FBS football, in which teams are eligible to participate in postseason bowl games such as the Rose Bowl, and the Football Championship Subdivision, where teams are not.

1 sports, at schools that hired four coaches after the bylaws were
2 amended, the lowest paid coaches on average made 50.5% of what the
3 second-lowest paid coach made. See *id.* ¶ 68 & Table 5.

4 To calculate damages, Dr. Ashenfelter assumed that all
5 Division I programs for all sports in each category would have
6 paid all volunteers the salary of the lowest paid coach in the
7 actual world adjusted by the same calculated "stepdown"
8 percentage. See *id.* ¶ 71. Thus, Dr. Ashenfelter assumed that all
9 men's lacrosse programs would have hired the coaches who
10 volunteered at a salary equal to 50.5% of the salary of their
11 lowest paid assistant men's lacrosse coach—even if those programs
12 did not hire an additional paid coach after the bylaws permitted
13 them to do so. See *id.* ¶ 71. Dr. Ashenfelter did not take into
14 account whether that calculated "stepdown" percentage makes sense
15 for men's lacrosse as compared to women's softball. He just
16 assumed one uniform stepdown number calculated for all sports that
17 were allowed under the rules to pay four coaches. See *id.* ¶¶ 65-
18 71.

19 As explained below, Dr. Ashenfelter did not do anything to
20 account for the possibility that the coaches in his sample who
21 were hired for new paid positions were different from the coaches
22 who worked as volunteers in ways that would affect their earnings.
23 McCreadie Decl. Ex. 2, Ashenfelter Dep., at 240:23-241:3. He did
24 not do anything to determine whether the coaches hired for new
25 positions were more experienced, tenured or skilled than the
26 volunteers, and did not account for that possibility. And he did
27 not do anything to account for differences in qualifications or
28 resulting pay across sports.

1 **C. Dr. Rascher's Model**

2 The putative class in the *Smart* case consists of volunteer
3 baseball coaches. Their expert is Dr. Rascher. To estimate
4 damages for coaches who volunteered at programs during the class
5 period that did *not* hire an additional paid baseball coach after
6 the bylaws permitted them to do so in 2023, Dr. Rascher used
7 salaries earned by coaches at 105 Division I schools that did hire
8 a third paid assistant baseball coach after the bylaws were
9 amended. Amended Expert Declaration of Daniel A. Rascher in
10 Support of Motion for Class Certification, dated Nov. 7, 2024, ECF
11 64-02 ("Rascher Report") ¶ 182 & n.198; McCreadie Decl. Ex. 3,
12 Rascher Dep., at 222:2-7. Dr. Rascher divided the Division I
13 baseball programs into deciles based on their expenditures on
14 baseball. Rascher Report ¶ 184 & n.198. He then compared the
15 salaries that schools that did not hire additional paid coaches
16 paid to the average salaries paid by schools in the same decile.
17 Specifically, he divided (1) the salaries that schools that did
18 not hire additional paid coaches paid their assistant baseball
19 coaches in the actual world by (2) the average salaries that
20 baseball programs in each decile paid to their two highest paid
21 assistant coaches. McCreadie Decl. Ex. 3, Rascher Dep., at
22 220:25-222:7; Rascher Report ¶ 184.

23 To calculate damages, Dr. Rascher assumed that this same
24 ratio of salaries for the two highest paid assistant coaches in
25 each decile in the actual world would have held for salaries paid
26 to the lowest-paid coaches in the but-for world. See Rascher
27 Report ¶¶ 184-85. Thus, if in the 2023-2024 season Program A—
28 which did *not* hire an additional paid coach—paid its assistant

1 coaches 75% of what schools in its decile paid, then Dr. Rascher
2 assumed that Program A would have paid its volunteers 75% of what
3 coaches who were hired for new positions at programs in that
4 decile were paid in the 2023-2024 season, adjusted for inflation
5 in coaching salaries.³

6 As explained below, Dr. Rascher did not do anything to
7 account for the possibility that the coaches in his sample who
8 were hired for new paid positions were different from the coaches
9 who worked as volunteers in ways that would affect their earnings.
10 See McCreadie Decl. Ex. 3, Rascher Dep., at 249:7-24. He did not
11 do anything to determine whether the coaches hired for new
12 positions were more experienced, tenured or skilled than the
13 volunteers, and did not account for that possibility.

14 **III. LEGAL STANDARDS**

15 Under Federal Rule of Evidence 702, "[a] witness who is
16 qualified as an expert by knowledge, skill, experience, training,
17 or education may testify in the form of an opinion or otherwise if
18 the proponent demonstrates to the court that it is more likely
19 than not that" (among other things) "the testimony is the product
20 of reliable principles and methods" and "the expert's opinion
21 reflects a reliable application of the principles and methods to
22 the facts of the case." Fed. R. Evid. 702.

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24
25 ³ To estimate what volunteers at baseball programs who hired a
26 third paid assistant coach in 2023-2024 would have earned,
27 Dr. Rascher simply assumed that those volunteers would have earned
28 the same amount as the coaches who were actually hired for the
newly created positions (adjusted for inflation in coaching
salaries). McCreadie Decl. Ex. 3, Deposition of Daniel Rascher,
at 220:14-24, 249:7-250:11; Rascher Report ¶¶ 184-85.

Under Rule of Evidence 702, this court acts as a "gatekeeper" to ensure that expert testimony is reliable. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). The purpose of judicial gatekeeping under Rule 702 is "to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

"To evaluate reliability, the district court 'must assess the expert's reasoning or methodology, using as appropriate criteria such as testability, publication in peer-reviewed literature, known or potential error rate, and general acceptance.'" *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (citation omitted). Courts exclude expert testimony based on assumptions that are "not sufficiently founded on facts." *Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 831-32 (9th Cir. 2001). And "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

IV. ARGUMENT

A. Both Experts Fail to Address Standard Economic Factors in Determining Earnings

Plaintiffs' experts' models of what volunteer coaches supposedly would have earned if NCAA Division I bylaws had permitted teams to pay additional coaches are unreliable because they fail to control for factors that standard economics finds have a significant effect on earnings. The "key question

1 regarding the admissibility of" expert "statistical analyses is
2 whether they account for the 'major factors.'" *In re Live Concert*
3 *Antitrust Litig.*, 863 F. Supp. 2d 966, 974 (C.D. Cal. 2012). "The
4 importance of accounting for the relevant 'major variables' has
5 been recognized as particularly important in the context of
6 antitrust litigation." *Id.* at 973. Both Dr. Ashenfelter and
7 Dr. Rascher testified that workers' experience, tenure and skill
8 are major factors in their earnings. See McCreadie Decl. Ex. 2,
9 Ashenfelter Dep., at 71:18-72:4; *id.* Ex. 3, Rascher Dep., at
10 230:1-10. But neither accounted for these factors.

11 **Ashenfelter.** Dr. Ashenfelter characterized this principle,
12 known as "human capital theory," as "standard in labor economics,"
13 *id.* Ex. 2, Ashenfelter Dep., 74:20-23; see also *id.* at 41:5-12,
14 and the "norm" in the field—"one of the topics that we always
15 cover." *Id.* at 72:5-12. Indeed, nearly fifty years ago, Dr.
16 Ashenfelter wrote in a published academic paper that "any theory
17 of the determination of earnings will imply that current earnings
18 are the result of a variety of historical factors," including
19 experience, and that "good summary measures" of a worker's
20 cumulative experience are "age and previous earnings." McCreadie
21 Decl. Ex. 9. He also provided sworn testimony in a prior
22 antitrust case that "[s]tandard human capital theory links an
23 individual's earnings to his or her level of education, job
24 experience, industry and industry experience, and an individual's
25 job title in a particular industry." McCreadie Decl. Ex. 1 ¶ 96.

26 **Rascher.** Dr. Rascher agrees that, according to "standard
27 labor economics," workers' skills will affect their wages. *Id.*
28 Ex. 3, Rascher Dep., at 96:10-97:18. He testified that, according

1 to standard human capital theory, workers' pay is a function of
2 their value and "individual factors can sort of drive what that
3 value is." *Id.* at 230:24-231:9. Dr. Rascher acknowledged that
4 this principle would be found in a "labor economics textbook."
5 *Id.* at 231:17-23. Indeed, Dr. Rascher's own source from the
6 Bureau of Labor Statistics (which he testified is "generally
7 reliable," *id.* at 239:2-8) states: "Everyone brings unique skills
8 and abilities to a job. And no two jobs are exactly alike.
9 Variations affect pay for jobs within the same occupation. Often,
10 the more pronounced these variations are, the bigger the wage
11 difference."⁴ See Rascher Report ¶ 74 n.87 (citing the source).

12 Thus, there is no dispute that "experienced workers usually
13 earn more than beginners. Workers who have in-demand skills also
14 may earn more."⁵ See also McCreadie Decl. Ex. 4, Report of Jee-
15 Yeon K. Lehmann (hereinafter "Lehmann Report"), ¶¶ 126-36
16 (discussing Dr. Ashenfelter's failure to account for various
17 factors impacting human capital, including the impact on his
18 results).

19 There also is no dispute that experience and skills vary from
20 worker to worker: in Dr. Rascher's words, "every person is
21 different." McCreadie Decl. Ex. 3, Rascher Dep., at 97:20-23,
22 240:2-6, 247:22-248:13, 251:25-252:2. In fact, Dr. Rascher
23 testified that it is "textbook" economics that "variations in []
24 skill affect pay for jobs within the same occupation." *Id.* at

25
26 ⁴ Elka Torpey, *Same Occupation, Different Pay: How Wages Vary*,
27 U.S. BUREAU OF LAB. STAT. (May 2015), <https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm>.

28 ⁵ *Id.*

1 242:5-24. That is why economists typically control for these
2 employee-specific factors when trying to isolate the effect of a
3 defendant's conduct or an external event on earnings. See Lehmann
4 Report ¶ 132 (noting that "Dr. Ashenfelter's own previous expert
5 work and academic work underscores the importance of controlling
6 for variations in the levels and types of human capital in
7 determining compensation").

8 For example, Dr. Ashenfelter controlled for employee-specific
9 factors in estimating earnings in an antitrust case where the
10 plaintiffs alleged that animation studios agreed not to recruit or
11 hire each other's employees. He used compensation data "to
12 estimate the standard human capital earnings model" for the
13 defendants. *Nitsch*, 315 F.R.D. at 299. His model used "age as a
14 proxy for an individual's total job market experience" and "tenure
15 with the current employer to account for the fact that earnings
16 increase as the total job market experience and tenure with the
17 employer increase." McCreadie Decl. Ex. 1 ¶¶ 98, 113-114. In the
18 animation studio case, Dr. Ashenfelter included variables for
19 those factors in his regression to control for their effect on
20 earnings. See *id.*; see also *Nitsch*, 315 F.R.D. at 305 (noting
21 that "Dr. Ashenfelter's regression model controls for . . .
22 employee-specific variables, such as age and tenure with the
23 Defendant"); McCreadie Decl. Ex. 2, Ashenfelter Dep., at 244:3-7.
24 Dr. Ashenfelter also has controlled for how workers' experience
25 affects their earnings as an expert in discrimination cases. *Id.*
26 at 78:22-79:5.

27 The plaintiffs' expert in *Law v. NCAA*, which Plaintiffs
28 herald as the proper comparator for this case, also used age to

1 control for experience in modeling what Division I coaches would
2 have earned if NCAA bylaws had not been in effect. In that case,
3 Dr. Robert Tollison stated in his expert report that it "is well
4 known among economists [that] age has an independent effect upon
5 worker earnings, due, for example, to the accumulation of
6 experience and human capital over time." Tollison *Law Aff.*, 1996
7 WL 34400119. According to Dr. Tollison's report in the *Law* case,
8 "it is appropriate to account for the effect of age on earnings in
9 the basic damage model." *Id.* In fact, he stated that this was
10 the "first order of business" in order to "to allow for the
11 control of other factors that affect coaches' earnings and hence
12 the estimation of damages." *Id.* Dr. Tollison accordingly used a
13 regression "to estimate the impact of age on coaches' earnings."
14 *Id.*

15 Unlike Dr. Ashenfelter in prior cases and unlike the
16 plaintiffs' expert in the *Law* case, here neither Dr. Ashenfelter
17 nor Dr. Rascher controlled for experience, skill, tenure, age or
18 other factors that standard economics finds affect earnings. See
19 McCreadie Decl. Ex. 2, Ashenfelter Dep., at 242:7-243:4, 250:20-22
20 ("Q. In this case you did not control for employee specific
21 effects? A. That is correct."); *id.* Ex. 3, Rascher Dep., at
22 257:22-258:3.

23 In short, both Dr. Ashenfelter and Dr. Rascher (1) agreed
24 that it is standard economics that workers' earnings depend on
25 (among other things) their skills and experience, (2) agreed that
26 experience and skills vary from worker to worker, but (3) did not
27 make any attempt to control for differences in workers' experience
28 and skills in estimating earnings. This could be why

1 Dr. Ashenfelter's model makes significant errors in predicting
2 actual coach salaries, estimating that coaches would have made
3 several times more than, or only a fraction of, what they actually
4 made after the bylaws were amended. See Lehmann Report ¶ 124 &
5 Exhibit 10. To take just one example, Dr. Ashenfelter's model
6 predicted that the lowest-paid Women's Volleyball coach at the
7 University of Utah would receive around \$36,000, yet they actually
8 received around [REDACTED]. *Id.* ¶ 125.

9 Dr. Ashenfelter and Dr. Rascher failed to account for a
10 textbook principle of labor economics and, frankly common sense,
11 that more skilled, experienced workers are paid more. See *Reed v.*
12 *Advoc. Health Care*, 268 F.R.D. 573, 594-95 (N.D. Ill. 2009)
13 (economist's testimony was "essentially inadmissible" where his
14 earnings model "fails to account" for factors such as "nurse
15 performance and merit . . . that may play into an individual
16 nurse's" wage); *Live Concert Antitrust Litig.*, 863 F. Supp. 2d at
17 975 (excluding expert analysis that "fails to account for
18 differences in artist quality/popularity" where "[c]ommon sense
19 dictates that a more popular music artist typically will command
20 higher ticket prices than a less popular artist").

21 Accordingly, their earnings models are unreliable and
22 inadmissible under Rule 702. See *Munoz v. Orr*, 200 F.3d 291, 301
23 (5th Cir. 2000) (court properly excluded testimony of expert who
24 "admitted to failing to consider other variables such as education
25 and experience as explanations for any observed discrepancy
26 between promotion rates"); *Bickerstaff v. Vassar Coll.*, 196 F.3d
27 435, 449 (2d Cir. 1999), *as amended on denial of reh'g* (Dec. 22,
28 1999) (same where expert did "not even purport to account for two

of the[] major variables" in salaries: "merit and seniority");
Werede v. Allright Holdings, Inc., No. CIV.A03CV01167WDMCBS, 2005
 WL 2124553, at *5 (D. Colo. Sept. 2, 2005) (same where expert
 incorporated "no consideration of variables of education,
 experience and so forth").

B. Neither Expert Addresses Sample Selection Bias

Both experts' earnings models are unreliable and should be
 excluded for the related but independent reason that they do not
 address sample selection bias, which is a fundamental problem with
 statistical analysis in economics. In a nutshell, the issue is
 that both experts' models use a sample of salaries of coaches who
 were hired as paid assistant coaches in the real world to predict
 salaries of volunteer coaches who were not. See Lehmann Report
 ¶¶ 137-42, 166-67. As compared to volunteers who were not hired
 for paid positions, the coaches who were hired as paid assistant
 coaches in the sample were likely (1) more skilled and
 experienced, and (2) hired by schools that had greater demand for
 coaches. Together, those factors would have increased the
 salaries of coaches in the sample compared to many volunteers.
 But neither expert tried to account for that risk of error from
 the sample.

The sample selection problem arises "where experts have
 attempted to draw generalizable conclusions from limited data."
Pella Corp., 214 F. Supp. 3d at 492. "[W]hen an expert attempts
 to draw conclusions about an entire population from a sample-based
 analysis, the sample[] must be chosen using some method that
 assures the sample[] [is] appropriately representative of the
 larger entity or population being measured." *Id.* at 493 (citation

1 omitted). If "a sample is drawn from a subsection of the overall
2 population that possesses some trait not shared by the remainder
3 of the population, a study of that sample will tend to produce
4 inaccurate results if this subsection-specific trait affects or
5 correlates with the dependent variable" that the expert is trying
6 to study. *Id.* at 492.

7 "This type of systematic difference between the observations
8 included in the study versus those that are not renders expert
9 testimony based on these data unreliable." *Orthoflex, Inc. v.*
10 *ThermoTek, Inc.*, 986 F. Supp. 2d 776, 805 (N.D. Tex. 2013); *see*
11 *also Moussouris v. Microsoft Corp.*, 311 F. Supp. 3d 1223, 1244
12 (W.D. Wash. 2018) ("Representativeness is essential to the
13 reliability of a study because to the extent that a sample
14 systematically differs from the population, inferences about the
15 population from the sample are misleading.") (quotations omitted).

16 Thus, according to Dr. James Heckman (who won the Nobel Prize
17 in Economics in part for his work on the sample selection bias
18 problem, which is "very famous . . . in labor economics," *see*
19 *McCreadie Decl. Ex. 2* at 63:14-21, 64:8-11), the "essence of the
20 selection problem" is the use of data regarding a sample that is a
21 "distorted representation" of the population the researcher is
22 trying to study so that the sample "does not accurately describe
23 the true population." *Id. Ex. 6*; *see also* *Lehmann Report* ¶ 138
24 ("Selection bias occurs when the sample used for analysis is not
25 randomly selected from the population, leading to systematic
26 differences between those included in the sample and those
27 excluded."). Both of Plaintiffs' experts agreed.

1 **Ashenfelter.** Dr. Ashenfelter testified that "the sample
2 selection bias problem arises where there is some difference
3 between the population reflected in the data that you're looking
4 at and the population that you're trying to study." McCreadie
5 Decl. Ex. 2, Ashenfelter Dep., at 62:25-63:7. According to Dr.
6 Ashenfelter, it is "important in labor economic analysis to avoid
7 sample selection bias." *Id.* at 64:12-14. He testified that it is
8 a "standard technique in economics" to address sample selection
9 bias by using a random sample. *Id.* at 142:24-143:15. But Dr.
10 Ashenfelter did not use a random sample. *Id.* at 143:16-23.
11 Instead, he based his damages model on a hand-picked sample of
12 coaches who were hired for paid positions created after the bylaws
13 were amended. *Id.* at 207:15-19, 210:5-18.

14 Dr. Ashenfelter did not study how the qualifications of any
15 coach who was hired as an additional paid coach after the bylaws
16 were amended (and in the sample) compared to the qualifications of
17 any coach who volunteered in the same sport in the same school
18 during the class period. *Id.* at 239:12-17. In fact, Dr.
19 Ashenfelter did not investigate the qualifications of any
20 Division I coach compared to any other Division I coach. *Id.* at
21 173:9-12. Accordingly, Dr. Ashenfelter could not rule out that
22 coaches who were hired for additional paid coaching positions were
23 more skilled or experienced than the coaches who volunteered
24 during the class period. *Id.* at 238:5-11.

25 Record evidence suggests that was the case. Named Plaintiffs
26 Khala Taylor and Rudy Barajas were not hired as paid assistant
27 coaches after the NCAA bylaws were changed. McCreadie Decl.
28 Ex. 7, Taylor Dep., at 241:10-242:1; *id.* Ex. 8, Barajas Dep., at

1 148:14-149:3. San Jose State's softball program and Fresno
2 State's women's volleyball program hired other coaches (not their
3 volunteer coaches) as paid assistants. *Id.* Ex. 7, Taylor Dep., at
4 204:1-205:5; *id.* Ex. 8., Barajas Dep., at 133:19-134:25. Indeed,
5 San Jose State would not even agree to allow Ms. Taylor to
6 continue coaching in an *unpaid* capacity following the bylaw
7 change. *Id.* Ex. 7, Taylor Dep., at 200:13-201:5, 206:6-15. As
8 Dr. Ashenfelter admitted, according to standard economics, schools
9 would hire the coach with the skills and experience that will
10 provide "the most payoff." *Id.* Ex. 2, Ashenfelter Dep., at 157:9-
11 22, 158:6-17. Indeed, the NCAA's expert found evidence that
12 schools have done exactly that since the bylaw repeal. See
13 Lehmann Report ¶ 80 (giving specific examples).

14 Differences in skill and experience between coaches in the
15 sample and volunteers are important because Dr. Ashenfelter
16 admitted that "it's standard in labor economics that an
17 individual's earnings will depend on their skills and their
18 experience." McCreadie Decl. Ex. 2, Ashenfelter Dep., at 74:20-
19 23. Dr. Ashenfelter, however, did not do anything to address the
20 possibility that coaches hired for newly created paid positions
21 would have been paid more than volunteers applying for those
22 positions because they had more valuable skills and experience.
23 *Id.* at 240:23-241:3 ("Q. Did you do anything to try to account
24 for or address the possibility that the coaches who were hired as
25 additional paid coaches after the bylaws were amended had more
26 skills or experience than the coaches who were volunteers? A.
27 No."); see also Lehmann Report ¶ 141 (NCAA expert explaining that
28 failure to account for coach-specific skills and experience "will

1 likely overestimate salaries" because coaches hired for new paid
2 positions are likely to be "more experienced and better qualified
3 than at least some volunteer coaches").

4 In addition to ignoring differences in coaches' skills,
5 Dr. Ashenfelter also failed to address differences in schools'
6 demand, which he agreed affects market wages. McCreadie Decl.
7 Ex. 2, Ashenfelter Dep., at 42:18-21, 183:5-18. Dr. Ashenfelter
8 agreed that schools in the sample that added paid coaching
9 positions could have had "higher demand for coaching services than
10 the schools who did not." *Id.* at 241:4-9. But Dr. Ashenfelter
11 did not "do anything to control for that." *Id.* at 241:10-11; see
12 also Lehmann Report ¶ 139 (NCAA expert explaining that failure to
13 control for difference between schools that hired additional paid
14 coaches and those that did not will bias results because schools
15 that hired additional paid coaches likely had greater demand and
16 would have paid more).

17 In fact, Dr. Ashenfelter deliberately excluded evidence from
18 schools that did not add paid coaching positions after the bylaws
19 were amended. McCreadie Decl. Ex. 2, Ashenfelter Dep., at 210:5-
20 18. For example, Plaintiff Rudy Barajas was hired to coach
21 women's volleyball at Fresno State after the bylaws were amended,
22 but was not paid. *Id.* Ex. 8, Barajas Dep., at 132:23-134:6.
23 Dr. Ashenfelter acknowledged that Mr. Barajas's rate was not
24 dictated by the NCAA rules and that Mr. Barajas's salary would
25 affect supply and demand for volleyball coaching. *Id.* Ex. 2,
26 Ashenfelter Dep., at 214:16-215:1, 216:12-19. But Dr. Ashenfelter
27 did not include Mr. Barajas's salary of zero in his damages model.
28 *Id.* at 217:9-13. Nor did he do any analysis to identify how many

1 schools had chosen to keep on their volunteer coach at a salary of
2 zero after the bylaw change, as Fresno State did with Mr.
3 Barajas.⁶

4 Because Dr. Ashenfelter has failed to correct for selection
5 bias in any way, his damages model is unreliable.

6 **Rascher.** Dr. Rascher described sample selection bias in
7 terms of the following question: when "you're wanting to analyze"
8 a given "population and you take a sample from that population,"
9 "is the sample representative of the population"? McCreadie Decl.
10 Ex. 3, Rascher Dep., at 127:25-128:8. Dr. Rascher agreed that it
11 can be "important in econometric analysis to avoid selection
12 bias." *Id.* at 128:9-12. He also acknowledged that economists
13 have developed tools to address sample selection problems, and
14 that Dr. Heckman, for example, won the Nobel Prize for developing
15 some of those methods. *Id.* at 128:22-129:4.

16 Dr. Rascher used salaries of coaches who were hired for
17 newly-created paid positions to predict what volunteers would have
18 earned. *Id.* at 222:2-7. He acknowledged that different coaches
19 could provide different value, which might affect their earnings.
20 *Id.* at 242:19-24, 247:22-248:13. But Dr. Rascher did nothing to
21 compare the skills and experience of coaches hired for newly-
22 created positions and the coaches who volunteered. He testified
23 that he is not offering any opinion regarding whether the coaches

24 ⁶ Mr. Barajas was not an anomaly. Other schools—including Arizona
25 State University, the University of Arkansas, and UC Davis—have
26 continued to hire volunteers in multiple sports. See Opp. at 23-
27 26; see also Lehmann Report ¶¶ 71-75 & Exhibits 8-9 (giving
28 further examples in the Atlantic Coast Conference, Mountain West
Conference, PAC-12 Conference, Big West Conference, and Big South
Conference).

1 hired for newly created paid positions after the bylaws were
2 amended were more qualified or skilled than the coaches who
3 volunteered during the class period. *Id.* at 180:1-8.

4 Thus, the only evidence in the record on this issue suggests
5 that at least some volunteer baseball coaches were not as
6 qualified as the coaches who were hired instead. *See, e.g.,*

7 Lehmann Report ¶ 80 (providing examples). Dr. Rascher's own

8 analysis shows that almost half of the volunteer baseball coaches
9 in the 2022-2023 year were not hired for newly-created paid

10 positions after the bylaws were amended. McCreadie Decl. Ex. 3,

11 Rascher Dep., at 174:3-14; Rascher Report ¶ 78 & Exhibit 1.

12 Similarly, testimony from the University of Arkansas suggests that

13 Plaintiff Taylor Smart, who was a volunteer baseball coach there,

14 was not considered as qualified as Bobby Wernes, who was hired for

15 a newly created paid assistant baseball coach position there after

16 the bylaws were amended. Declaration of Clayton Hamilton in

17 Support of NCAA's Opposition to Plaintiffs' Motions for Class

18 Certification ¶ 12.

19 Dr. Rascher himself testified that the volunteer position was

20 a "way for coaches to move their way up" in coaching, *i.e.,*

21 volunteers were still gaining experience so that they could be

22 hired for a paid coaching position. McCreadie Decl. Ex. 3,

23 Rascher Dep., at 140:6-10; *see also* Opp. at 21-22 (citing

24 examples). Indeed, this is still happening even after the bylaw

25 repeal. One of Fresno State's baseball coaches is a volunteer who

26 lives with his parents and is gaining valuable experience coaching

27 as an unpaid coach while looking for a paid coaching job. *See*

28

1 Declaration of Rob Acunto in Support of NCAA's Opposition to
2 Plaintiffs' Motions for Class Certification ¶ 8.

3 Dr. Rascher, however, did not do anything to "control for the
4 possibility" that coaches hired for additional paid positions
5 created after the bylaws were amended were more skilled and
6 experienced than the volunteers who were still trying to gain
7 experience. McCreadie Decl. Ex. 3, Rascher Dep., at 249:7-24.
8 Nor could he now claim to have tried to address potential sample
9 bias because he testified that he "didn't see a selection bias
10 problem" in the first place. *Id.* at 129:25-131:25.

11 On the demand side, Dr. Rascher agreed that schools' demand
12 would affect market earnings. *Id.* at 97:2-18, 230:1-10, 244:5-10.
13 He admitted that, generally, "[t]he schools that hired third paid
14 [baseball] assistants after the bylaws were amended are, all
15 things being equal, more likely to be interested in baseball than
16 the schools that didn't hire third paid assistants." *Id.* at
17 222:16-23. But Dr. Rascher did not address the fact that schools
18 that hired paid coaches after the bylaws were amended had greater
19 demand for coaching services. This, too, results in selection
20 bias and "will tend to overestimate salaries" for third paid
21 assistant baseball coaches in the but-for world. Lehmann Report
22 ¶ 166.

23 * * * *

24 In short, both Dr. Ashenfelter and Dr. Rascher agreed that
25 sample selection problems are well-known in economics and arise
26 when a sample is not representative of the population being
27 studied. Evidence suggests that both experts' sample of coaches
28 who were hired for newly created positions after the bylaw change

1 were not representative because they were more skilled and
2 experienced and were hired by schools with greater demand. But
3 neither expert even tried to address that issue.

4 Courts exclude testimony from experts who fail to ensure that
5 their samples do not bias their results. See *Pella Corp.*, 214 F.
6 Supp. 3d at 492-93 (excluding expert's testimony where "focusing
7 on these allegedly defective Windows would seemingly tend to
8 overstate the incidence of Window problems in the overall
9 population"); *Allgood v. Gen. Motors Corp.*, No. 102CV1077DFHTAB,
10 2006 WL 2669337, at *11 (S.D. Ind. Sept. 18, 2006) (same where
11 plaintiff's expert "failed to offer any scientific justification
12 for his sample selection choices"); *In re Countrywide Fin. Corp.*
13 *Mortg.-Backed Sec. Litig.*, 984 F. Supp. 2d 1021, 1039 (C.D. Cal.
14 2013) (same due to selection bias in plaintiff's expert's model
15 that used a "nonrandom selection of subjects for study").

16 Even if, "as a practical matter, it may be impossible to
17 conduct a rigorous statistical analysis" of the issue the expert
18 has examined," the courts conclude that "convenience is not a
19 substitute for reliability under Daubert." *Pella Corp.*, 214 F.
20 Supp. 3d at 493; see also *Countrywide*, 984 F. Supp. 2d at 1040
21 ("The Court cannot countenance the use of this type of convenience
22 sample that is 'easy to take but may suffer from serious bias.'")
23 (quoting Federal Judicial Center, Reference Manual on Sci. Evid.
24 § 211 (3d ed.), 2011 WL 7724256, at *46).

25 Plaintiffs' experts' unexplained failure to account for the
26 standard economic problem of selection bias renders both models
27 unreliable and inadmissible under Rule 702.

28

1 **C. Dr. Ashenfelter's Model Relies on Arbitrary Groups of**
2 **Different Sports**

3 Dr. Ashenfelter's earnings model also is unreliable because
4 he tries to estimate earnings using averages of salaries of
5 coaches in different sports with different supply and demand
6 conditions. That is, Dr. Ashenfelter tried to estimate a market
7 wage by lumping together salaries of coaches in different markets.
8 See Lehmann Report ¶ 127.

9 The court's decision in *In re Google Play Store Antitrust*
10 *Litigation*, No. 20-CV-05761-JD, 2023 WL 5532128 (N.D. Cal.
11 Aug. 28, 2023), is instructive as to how an expert cannot
12 construct a damages model that relies on grouping together
13 products that are not generated by the same supply and demand
14 conditions. In the *Google Play* case, the plaintiff's expert built
15 a damages model to predict the prices of smartphone apps and
16 transactions in those apps. The model assumed that smartphone
17 apps "in each category" in the app store were "substitutes for one
18 another." *Id.* at *8. For example, the model assumed that an app
19 for identifying plants and an app for learning languages were
20 substitutes.

21 However, this was an "unproven assumption" that "flies in the
22 face of the huge diversity of apps" in the store's "categories."
23 *Id.* The court found it "obvious that users looking for an app to
24 learn Italian will not try to avoid a price hike by switching to
25 an app that identifies the type of geranium in their kitchen."
26 *Id.* at *7. Because the plaintiff's expert did "not provide usable
27 guidance on what to do with the myriad of differences and
28 distinctions between apps" and did "not provide any boundaries on

1 substitution in broad app categories that contain many unlike
2 products," it was unreliable to build a damages model based on
3 those categories. *Id.* Because the damages model was "based on
4 assumptions" that were "not supported by the evidence," the Court
5 found that it would "not give the jury a sound basis on which to
6 make a reasoned and reasonable judgment about antitrust impact and
7 damages," and thus was inadmissible. *Id.* at *9.

8 The same is true here. Dr. Ashenfelter's model relies on
9 salaries in categories of sports based not on supply and demand,
10 but on how many paid coaches the amended NCAA bylaws permit a
11 program to hire in each sport. See Lehmann Report ¶¶ 127-28. In
12 order for that approach to be meaningful, there must be some
13 relationship between salaries for coaching the sports in each
14 group. As Dr. Ashenfelter testified, "the market rate is
15 determined by supply and demand throughout the entire market,"
16 McCreadie Decl. Ex. 2, Ashenfelter Dep., at 183:16-18, and "in
17 order to calculate a relative wage rate that is accurate . . . you
18 need to use jobs whose salaries are determined by the same
19 factors." *Id.* at 186:12-15. Thus, Dr. Ashenfelter admitted, "if
20 there's different supply and demand in different Division I
21 sports," then an analysis "based on grouping sports together"
22 would result in some estimates of earnings that "were too high and
23 some that were too low." *Id.* at 191:2-9. Such an approach "could
24 mask variation between those sports." *Id.* at 50:11-14.

25 Dr. Ashenfelter did not do any analysis to determine whether
26 supply and demand for coaching in one sport affects supply and
27 demand or salaries for coaching in any other sport, and he formed
28 no opinion on that issue: "Q. Do you have an opinion as to

1 whether supply and demand for coaches in each Division I sport is
 2 the same? A. Well, I haven't done that test, so I haven't done
 3 the analysis of what would allow you to say." *Id.* at 189:7-17.
 4 Dr. Ashenfelter did not analyze whether "differentials in one
 5 sport between salaries for different coaches in that sport are
 6 affected by the differentials among salaries in another sport."
 7 *Id.* at 163:12-164:2. Indeed, Dr. Ashenfelter did not define any
 8 labor market at all. *Id.* at 192:15-20. He therefore reached no
 9 opinion on whether, for example, "jobs coaching swimming belong in
 10 the same market in the economic sense as jobs coaching softball."
 11 *Id.* at 192:22-193:5.

12 It is obvious that, in general, most people who coach one
 13 sport have different skills than most people who coach other
 14 sports, and that people qualified to coach one sport generally are
 15 not qualified to coach other sports. Dr. Ashenfelter himself
 16 testified that workers with "different sets of skills" should be
 17 in separate markets. *Id.* at 14:9-25. Even Dr. Rascher in his
 18 report agreed that "*coaches in each sport[]* provide their labor
 19 services in a distinct market formed around a distinct reference
 20 labor product." Rascher Report ¶¶ 73-74 (emphasis added); see
 21 also McCreadie Decl. Ex. 3, Rascher Dep., at 134:20-135:6. That
 22 is because "each sport has its own set of skills that aren't
 23 always transferable at the athlete and at the coaching level."
 24 McCreadie Decl. Ex. 3, Rascher Dep., at 134:20-135:11.⁷

25 _____
 26 ⁷ Indeed, Dr. Ashenfelter's own regression model shows that for
 27 several groups of sports, the number of permitted coaches is not a
 28 statistically significant variable for predicting how salaries of
 additional paid coaches compare to other coaches' salaries.
 Ashenfelter Report ¶ 68 & Table 5.

1 Perhaps that is why the plaintiffs' expert in the *Law v. NCAA*
2 case used a different approach in an antitrust case challenging a
3 different NCAA bylaw related to coach wages. The plaintiffs'
4 expert in that case (Dr. Tollison) conducted regressions that were
5 "sport-specific" to model damages "for each sport separately."
6 Tollison *Law Aff.*, 1996 WL 34400119.

7 That is not what Dr. Ashenfelter did here. Dr. Ashenfelter
8 tries to estimate market rates of pay for coaches in one sport by
9 using salaries for coaching in other sports that are determined by
10 different supply and demand conditions. See Ashenfelter Report
11 ¶¶ 66-68, 71. That violates basic economic principles that Dr.
12 Ashenfelter himself acknowledged.

13 Even worse, Dr. Ashenfelter's approach separates salaries of
14 coaches who have similar skills. Plaintiff Rudy Barajas, who was
15 a volunteer coach in both indoor and beach volleyball, testified
16 that indoor volleyball coaches are qualified to coach beach
17 volleyball and vice versa. McCreadie Decl. Ex. 8, Barajas Dep.,
18 at 66:18-20, 67:13-16, 69:14-70:2. Since the pool of potential
19 coaches in both sports overlap, the salaries of coaches in those
20 sports should be related. But Dr. Ashenfelter's model puts indoor
21 volleyball coach salaries and beach volleyball coach salaries in
22 different categories based on the mere fact that the bylaws permit
23 three paid coaches in one sport and four paid coaches in the
24 other. See Ashenfelter Report ¶ 66. Dr. Ashenfelter did not
25 explain why this distinction makes sense or contend with Mr.
26 Barajas's testimony.

27 Instead, Dr. Ashenfelter averaged salaries for coaches in
28 indoor volleyball along with salaries for coaches in field hockey,

1 gymnastics, ice hockey, lacrosse, rugby, soccer, softball, track
2 and field, water polo and wrestling, and averaged salaries for
3 coaches in beach volleyball with salaries for coaches in bowling,
4 cross country, fencing, golf, rifle, skiing, swimming, tennis and
5 triathlon. See *id.* ¶¶ 66-68, 71. This makes no economic sense.
6 Indeed, applying Dr. Ashenfelter's model to each sport separately
7 dramatically changes Dr. Ashenfelter's predictions of what coaches
8 in each sport would have earned, which suggests that salaries in
9 each sport are based on different supply and demand conditions.
10 Lehmann Report ¶¶ 127-28 & Exhibit 11. Dr. Ashenfelter has not
11 analyzed those conditions for any sport, let alone all of them.

12 Accordingly, in addition to failing to control for factors
13 that affect earnings and to address selection bias,
14 Dr. Ashenfelter's model assumes without any basis that salaries
15 for coaching dozens of different sports are subject to the same
16 supply and demand conditions. That is an additional reason why
17 his model is unreliable and inadmissible.

18 **V. CONCLUSION**

19 For the reasons set forth above, the NCAA respectfully
20 requests that the Court exclude Dr. Ashenfelter's and
21 Dr. Rascher's earnings models in connection with ruling on
22 Plaintiffs' motions for class certification.

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1 Respectfully submitted,

2 DATED: December 20, 2024 MUNGER, TOLLES & OLSON LLP

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By: /s/ Justin P. Raphael
JUSTIN P. RAPHAEL

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